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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

No. 375

FEDERAL TRADE COMMISSION,
*Petitioner,*

vs.

WALTER L. DIEGER, SECRETARY, BEATRICE FOODS CO.,
*Respondent.*

## ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*Attorneys for Respondent.*

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MAY IT PLEASE THE COURT:

Respondent, Walter L. Dilger, answers the Petition for a Writ of Certiorari filed herein and prays that the Petition be denied.

### QUESTION PRESENTED.

Whether the lower court erred in holding that the Federal Trade Commission could not compel production of copies of Census reports retained by a reporting company at the direction and for the further statistical purposes of the Census Bureau when the use sought to be made by petitioner of the information in said copies was precisely the use permitted by the Census Act to no one but authorized personnel of the Department of Commerce?

## STATEMENT.

In 1955 Beatrice Foods Co. received original and duplicate Census of Manufactures forms prepared by the Department of Commerce pursuant to the provisions of the Census Act, 13 U. S. C. 5. The duplicates on the front page in boldface type bear the word "Confidential" followed by the statement: "Your report is confidential and only sworn census employees will have access to it. It cannot be used for purposes of taxation, investigation, or regulation." This representation was followed by a mandate in boldface type: "Keep this copy for your files."

On January 7, 1959, the Federal Trade Commission served three subpoenas duces tecum on Beatrice by service on its Secretary, Walter L. Dilger, the respondent herein. These subpoenas required the production of the census copies referred to above in three Federal Trade Commission anti-merger proceedings (Clayton Act, Section 7) pending in three separate dockets against Beatrice Foods Co., National Dairy Products Corporation, and The Borden Company.

The Hearing Examiner and the Federal Trade Commission denied Beatrice's motion to quash the subpoenas and ordered Beatrice's census records produced, not only in the Beatrice docket but also in the dockets of its competitors, National Dairy and Borden. Upon Beatrice's refusal to produce the documents, the Federal Trade Commission petitioned the United States District Court in Chicago for an enforcement order on all three subpoenas. Upon hearing, the District Court denied the Commission's request in connection with the subpoenas issued in the National Dairy and The Borden Company dockets. From that part of the order the Commission has taken no appeal.

The District Court further ordered Beatrice to produce its census schedules to be used against Beatrice in its

own litigation—and from this part of the order Beatrice appealed. Only at that time did the Commission assume the position now asserted on page 14 of the petition that the census schedules should not be made available to competitors, and the claim that this position is in accordance with petitioner's practice (Pet. p. 14) is contradicted by the Commission's practice in this very case.

The Court of Appeals reversed the District Court and held that the privilege was intended to protect the person supplying the data and covered copies of schedules retained by Beatrice at the direction of and for the further statistical use of the Department of Commerce.

## ARGUMENT.

The Supreme Court's discretionary power to accept jurisdiction in this matter should not be exercised because petitioner has not established special and important reasons as required by the rules of this Court.

The principal reason advanced by petitioner appears in paragraph (1) (Pet. pp. 4-5) where the Court of Appeals' decision is portrayed as a major bottleneck to enforcement of the anti-merger law. Both litigated and non-litigated cases must now be determined, it is contended, "without illuminating market share data." This argument is embroidered with volunteered statistics concerning the volume of such cases now pending.

The relevant census statutes, together with their Congressional history, make it clear that *no one*, including the petitioner, may have access for any purpose to any schedule filed with the Census Bureau by a reporting company under the sanction of criminal penalties—and the Federal Trade Commission does not claim otherwise.

Having the same access to any and all census "universes" as does the general public—petitioner seeks to violate the integrity of these figures as statistics and to destroy their anonymity by reaching the industry-retained counterpart of the original report.

Prescinding from the moral implications residing in this sort of governmental behavior, it is submitted that petitioner's alleged claim of urgent necessity in the circumstances stated will not be met and satisfied by a reversal of the decision below unless it is to be supposed that corporate executives will thereafter retain in their files copies of their census reports. It should not surprise petitioner if outraged businessmen trapped between these

two governmental agencies will solve the problem in their own interests by not retaining the counterparts in their files — an eventuality contributing nothing to the solution of petitioner's alleged enforcement difficulties—but adding woes to the Census Bureau in its attempt to carry out the statutory duties assigned to it by Congress.

Petitioner's argument that the privilege extended to reporting companies by the provisions of the Census Act is limited to "protection only against exposure, by the Bureau of the Census, of their business secrets to competitors" flies in the face of the language of the statute which provides in Sec. 9(a)(3) that "Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in Section 8 of this title * * * (3) permit anyone other than the sworn officers and employees of the department or bureau or agency thereof to examine the individual reports." The contention that this language is capable of being construed into a permission for the Federal Trade Commission to gain access to the individual reports filed with Census constitutes a shining example of the outer limits of bureaucratic zealousness but should not be accepted by this Court as an important reason for granting the writ.

The acceptance of this argument, moreover, would compound the unfairness of the trap into which Beatrice would have fallen because of its compliance with the Census Statute in that petitioner now claims the right to use copies of Beatrice's census schedules to determine Beatrice's several market shares at the same time it is denying Beatrice the right of access to the like census schedules of each of its competitors in each relevant market data which Beatrice would then need to enable it to defend itself by demonstrating the market shares of each of its competitors in explanation or rebuttal of the inferences that petitioner

would seek to draw from the record, thus made, in the absence of this evidence.

Apart from the foregoing considerations, the Court of Appeals decided this case correctly. Petitioner concedes that a statutory privilege exists, that original census records mailed to the Bureau of the Census could not be subpoenaed, and that data if actually "furnished" to petitioner by the Bureau are specifically privileged (Census Act, Sec. 8). Petitioner further agrees that each copy now subject to subpoena contains on its face assurances that it "cannot be used for taxation, investigation or regulation". These documents are in no way business records maintained by business for business reasons as petitioner clearly demonstrates at page 5 of its Petition. Petitioner itself there characterizes them as unique and different "reports" to be distinguished from ordinary company "files". They are Census documents retained at the request of the Bureau of the Census. As Chief Judge Hastings, for a unanimous court, stated in the opinion below:

> "These assurances of confidentiality and protection constitute a pledge of good faith on the part of the Congress, the President and the Department of Commerce. We do not think that another arm of the Government (the Federal Trade Commission) can be heard to say that such representations may be avoided in this indirect manner. The United States has given its word and should be permitted to keep it."

## CONCLUSION.

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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EDWARD J. WENDROW,
EDWARD L. FOOTE,
*Attorneys for Respondent.*